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The Supreme Court and the Rule of Law

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I SHOULD like to approach this afternoon's subject along two lines. On the one hand, I propose to develop the subject in terms of the Supreme Court's contribution to our understanding of the Rule of Law, and, on the other hand, I propose to look at the Supreme Court as a governmental institution subject to the Rule of Law. In short, I propose to discuss the Supreme Court both as an instrumentality for the development of the American concept of the Rule of Law and as an institution governed by the Rule of Law. Needless to say, these two approaches are not mutually exclusive since the framework of limitations and principles within which the Court operates necessarily determines its positive contribution to the Rule of Law in our constitutional order.

1. *The Supreme Court's Contribution to the Rule of Law*

Although attempts are made to universalize upon the Rule of Law concept and perhaps even determine its content by reference to *a priori* principles based upon the nature of the social order and the values it serves, these efforts result in no unanimous agreement, and I am inclined to think that any conclusions to be drawn respecting the nature of the Rule of Law find their greatest validity in empiric survey and analysis of the operations of a given societal system. Here in the United States we have not, on the whole, given a lot of thinking to the Rule of Law idea which Dicey developed at such length on the basis of his observations of the English system. We speak of "government under law," of a "government of laws and not of men," or some may even use the term "due process of law" to refer in a broad way to ideas that may otherwise find expression in the rule of law terminology.

Nor has the Supreme Court, the central object of our discussion, engaged in any extended discussion of Rule of Law as an abstract question. Its understanding and contribution is largely dependent upon the implications of the constitutional order in which it operates, its role and functioning as a judicial body in the interpretation of the Constitution, and the values which it stresses.

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In the exercise of its authority, the Supreme Court functions in two principal respects. First, in the exercise of its power of judicial review, it assumes the authority and function of authoritative interpretation of the Constitution viewed as a fundamental law. Secondly, it is the court of last resort in interpreting treaties and laws of the United States. In both capacities it occupies a strategic and pivotal rule in determining the empiric significance of the Rule of Law in the United States. Although the Court's role in constitutional interpretation usually attracts the greater interest and will receive the major attention in the discussion that follows, it should be emphasized that the Court's function in the interpretation of statutes is no less important in evaluating the Court's contribution to the development of our constitutional order. As the English experience so well demonstrates, an independent judiciary can effectively protect basic rights and check abuses of executive and administrative power even though it does not presume to review the constitutionality of legislative acts.

If, whatever else we may mean by it, the Rule of Law means the subjection of governmental authority to legal restraint, then a system like ours means the elevation of the Rule of Law concept to its highest level. Recourse to disinterested tribunals to protect the citizen's rights and to check abuses of authority by executive and administrative officers and agencies is a feature usually judged indispensable to any concept of Rule of Law or of government under law. Indeed, I suppose that this is the most elementary meaning of due process of law, namely, that no person shall be deprived of life, liberty or property except in accordance with law and in accordance with the procedures established by law. But our system goes beyond this. Our Supreme Court, and here it symbolizes the entire judicial authority, assumes the function not only of determining whether officers of the government act within the limits of authority defined by law but the authority also to determine whether the law-making power has observed limits prescribed by the Constitution.

It is because acts of both Congress and the state legislatures may be challenged before the Supreme Court to determine their constitutional validity, by reference either to the distribution of powers under the Constitution or by reference to basic rights safeguarded by the Constitution, that the concept of the Rule of Law, in the sense that governmental authority is itself subject to law, assumes an extraordinarily large significance under our system. I

do not mean to suggest that a written constitution with a power in a supreme court to determine its final meaning, even to the extent of holding legislative acts invalid, is essential to any generalized concept of the Rule of Law. Independent courts with authority to interpret and apply the law and freely available to the citizen by effective remedial devices are commonly regarded as indispensable in any meaningful understanding of the Rule of Law in constitutional democracies. The power, however, to declare legislation invalid is not. Surely England furnishes us with a prime example of a country whose traditions and institutions give meaning to the rule of law idea. Yet no English court would assume to declare an Act of Parliament invalid by reference to the court's understanding of the English constitutional tradition.

But judicial review, resting on the twin postulates that the Constitution is fundamental law and that under our separation of powers it is peculiarly the function of the judiciary to interpret the meaning of law, is a fundamental American institution that furnishes a basic starting point in giving meaning to the Rule of Law for us.

The conception of the Constitution as fundamental law to be interpreted and vindicated by the judiciary deserves another word of emphasis. Much stress is placed in current discussions of the Rule of Law on the idea that law must rest on the will of people and that any meaningful concept of the Rule of Law presupposes the power of the people to determine basic policies of the government by means of free and universal suffrage and the institutions of representative government. I do not mean to discuss the question whether any universal concept of the Rule of Law presupposes a democratic society and the institutions for manifestation of the popular will. It is sufficient to note that while our constitutional system presupposes a legislative power resting on the will of people as determined by the right of the people to elect their representatives and in turn to retire them from office, it does not accept the thesis of the uncontrolled power of the majority. On the contrary, the popular will, as it finds expression in the legislative power, is subject to the fundamental law. Or to put the matter in another way, the temporal will of the people is subject to the more enduring general will reflected in the fundamental law.

We have, then, a system fortified by a written constitution and the exercise of judicial review, in which the Supreme Court occupies a pivotal role to the end that government in its totality is a

government under law. The system, therefore, is admirably adapted to provide the means for checking and assuring the legality of acts of government. To assure the integrity of this constitutional order is pre-eminently the task and role of the Supreme Court.

It is in the discharge of this role that the Supreme Court by the decisional process makes its contribution to the Rule of Law in our constitutional order. Its work on the constitutional level extends primarily to three areas: the umpiring of the federal system in order to preserve the constitutional balance of authority between the federal and state governments; its further work in preserving the balance between the executive power and the legislative power; and its role as defender of fundamental human freedoms. Its contribution to the Rule of Law is to be measured, however, not only by what it does to insure the legality of governmental acts, no matter in what division or on what level, but even more significantly by its conscious or unconscious explication of the values that in the eyes of the Supreme Court give ultimate meaning to our whole constitutional structure and, indeed, to the whole social structure and the objectives served by it. For, as Professor Harvey pointed out in his opening lecture of this series, the concept of the Rule of Law stated wholly in terms of restraints on the illegal exercise of power may be sterile and meaningless. The ultimate significance of the Rule of Law must be found in some understanding of the basic objectives served by the legal order and in turn the values treasured by our society.

What, then, has been the Supreme Court's contribution to our constitutional order and to the formulation of values served by our system?

I mentioned above the three principal areas in which it operates on the constitutional level. I shall not say much about the Court's function in umpiring the federal system. It is enough to say that the Court has contributed effectively to keep the states within their jurisdictional limits by its interpretation both of the implicit limitations on state authority derived from the Constitution, notably the commerce clause, and the limitations derived expressly or impliedly from legislation of Congress. On the other hand, the Court, particularly in recent years, has not functioned so effectively in keeping the power of Congress within limits. Indeed, the Court has virtually abdicated its authority in determining the limits on the authority of Congress in the exercise of the commerce power, unless the legislation impinges upon specifically protected rights,

and Congress is virtually free to determine for itself the reach of its power under the commerce clause. To put the matter in another way, the principle of federalism, so far as the regulation of economic matters is concerned, has yielded in importance to what the Court regards as the necessity of a power in Congress adequate to deal with situations of national importance in a society where the expansion of basic activities across state lines, the heightened development of national consciousness, and an increased awareness of the federal government's responsibility for meeting basic national needs render irrelevant much earlier thinking as to the proper spheres of authority as between the nation and the states.

Turning to the Court's role in preserving the balance between congressional power and Executive authority and in subjecting executive action to legal restraint, the recent years have witnessed an increased willingness and readiness of the Court to scrutinize the actions of the executive departments in the interest of vindicating the supremacy of law where basic rights are involved. Perhaps the most famous case of our generation bearing on this question is the steel seizure case.[1] Whatever else they mean and reduced to their minimum content, the majority opinions establish the fundamental idea that when the President deals with a matter within the legislative competence of Congress, his authority is subject to the congressional power and any exercise in conflict with congressional policy is invalid. Opinions may differ on the question whether the Court correctly applied this principle in the case before it, but the basic principle that the Executive must act within the limits of law and the implication of the decision that in case of conflict the Court will throw its weight behind the law-making power has important and vital relevancy in appraising the Court's contribution to the Rule of Law. We may also consider in this connection the Court's decision in *Cole v. Young*,[2] which held that the President had gone beyond statutory authority in extending the federal employee security program to persons not in sensitive positions. And finally, mention may be made of the passport cases[3] where the Court held that Congress had not authorized the Secretary of State to deny passports on grounds related to the applicant's political associations. The Court's readiness in these cases and others that may be mentioned to examine the legality of executive action in

1 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
2 351 U.S. 536 (1956).
3 Kent and Briehl v. Dulles, 357 U.S. 116 (1958); Dayton v. Dulles, 357 U.S. 144 (1958).

contexts where at an earlier time the Court might have rested its case on a theory of executive prerogative or discretion mark an increasingly important contribution by the Court in maintaining the Rule of Law.

Related to the foregoing are the recent significant decisions in which the Court has squarely relied on the Rule of Law idea to curb the exercise of executive power in areas of recognized discretionary authority. I have in mind the decisions holding that when a department head makes rules for his department, even though he otherwise is vested by statute with discretionary authority over the subject matter, his rules become law and he is bound by them and cannot choose to disregard them in dealing with a specific case. A prime example is the Court's holding that the Secretary of State had improperly discharged an employee of the department since he had not followed the rules governing the procedure for this type of case.[4]

The Supreme Court's most effective contribution, however, in recent years is found in its decisions dealing with basic rights of the individual, and if we are engaged in an empiric construction of the Rule of Law by reference to what the Supreme Court considers important in our constitutional structure, then certainly the protection of fundamental human rights by law and by means of adequate remedial processes for access to courts becomes a key element in the whole picture. For it is in the choice of values that the Court considers important and the way in which it protects these values that we get perhaps the best picture of the kind of society which the Court within the limits of its powers is promoting, and it is this conception of the kind of society and the values basic to it that point in the end to the significant objectives served by the Rule of Law.

The Court has two starting points in the Constitution in dealing with basic rights: first, the rights expressly protected as against the federal government and the states in the body of the Constitution and the Bill of Rights (the latter a limitation only on the federal government); secondly, the so-called fundamental rights which the Court has read into the interpretation of the due process clause. We know that at one stage in the Court's history, great emphasis was placed upon the protection of economic freedom, freedom of business enterprise and proprietary rights as fundamental rights in the interpretation of the due process clause. This

[4] Service v. Dulles, 354 U.S. 363 (1957).

interpretation was derived from the Court's reliance upon a laissez-faire economics as basic to our system. That day has passed, and it may safely be said that no particular type of economic system enjoys constitutional sanction at present. Or, to put the matter another way, the decline of economic liberty as a fundamental facet of basic rights reflects the Court's thinking that the determination of economic policy is a matter reserved for determination by the people's law-making representatives.[5]

On the other hand, the recent years have witnessed judicial emphasis upon a new set of constitutional rights, not new in the sense that they were previously unknown to the Constitution but new in the emphasis that the Court is placing upon them and new in the resolute exercise of judicial power to protect them. These basic rights fall into three categories: (1) procedural rights, particularly of those accused of crime; (2) the substantive freedoms of expression; and (3) the right to equal protection.

There is not time to detail the way in which the Court has given new emphasis to these rights. But the general features of this development deserve mention. First of all, the basic procedural rights stated in the Bill of Rights have received fresh treatment. The cases dealing with the privilege against self-incrimination,[6] double-jeopardy,[7] right of confrontation,[8] and right to counsel[9] are illustrative of what I mean. The decisions[10] holding invalid the statute and treaties authorizing trial abroad by courts-martial of non-military personnel charged with crime point to the Court's high regard for the right to trial by jury. Indeed, jury trial in all its phases, whether in criminal or civil cases, has probably been elevated to its highest point in our constitutional history. We may mention here also, although the cases did not rest on constitutional grounds, the recent decisions holding inadmissible confessions obtained by federal officers while holding a prisoner in violation of the statutory requirement of prompt arraignment[11] and the continued vitality of the rule of the *Weeks*

[5] See the Court's opinion in Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

[6] See, *e.g.*, Emspak v. United States, 349 U.S. 190 (1955).

[7] See Green v. United States, 355 U.S. 184 (1957).

[8] See Greene v. McElroy, 360 U.S. 474 (1959).

[9] See Johnson v. Zerbst, 304 U.S. 458 (1938).

[10] Reid v. Covert, Kinsella v. Krueger, 354 U.S. 1 (1957); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960).

[11] See, *e.g.*, Mallory v. United States, 354 U.S. 449 (1957).

case[12] holding inadmissible evidence obtained by illegal search and seizure.[13]

Similarly the Court has attached greater emphasis to the procedural significance of the due process clause as a limitation on the states. Freedom from illegal police methods in securing confessions,[14] the right to counsel as an element of a fair hearing,[15] and increasingly closer scrutiny of the fairness of trials[16] all testify to the Court's concern for the observance of procedural regularity.

In contrast to the decline of economic liberty as a fundamental right, the freedoms of the first amendment, including the freedom of religion, freedom of speech, press and assembly, and the cognate freedoms viewed as fundamental rights in the interpretation of the due process clause, have been elevated to the highest position in the values protected by the judiciary. The Court has characterized these freedoms as preferred freedoms in our society, and has shown a readiness to scrutinize more closely legislative and other governmental acts impinging upon them.[17] To be sure the Court is by no means unanimous in its decisions dealing with cases involving these issues. One part of the bench treats these freedoms as virtually absolute, and another segment finds that these freedoms are subject to limitation in the exercise of legislative power to achieve appropriate public interests.[18] But the vitality and importance of these rights in our system is recognized by all.

Finally, the right to equal protection of the laws, or conversely, the freedom from discrimination, has been a major development of the recent years, culminating in the famous decision holding invalid the laws requiring racial segregation in public schools.[19]

12 Weeks v. United States, 232 U.S. 383 (1914).

13 The Court has just recently extended the rule of the *Weeks* case in its holding that evidence obtained by state police officers by means of unconstitutional search and seizure may not be used in federal courts. Elkins and Clark v. United States, 364 U.S. 206 (1960).

14 See, *e.g.*, Fikes v. Alabama, 352 U.S. 191 (1957); Spano v. New York, 360 U.S. 315 (1959).

15 For the most recent case, see Hudson v. North Carolina, 363 U.S. 697 (1960).

16 See Thompson v. City of Louisville, 362 U.S. 199 (1960), where the Court reversed a conviction on the ground that it was not supported by any evidence. The case suggests interesting implications on the use of the due process clause as a basis for reviewing the sufficiency of the evidence in state criminal prosecutions.

17 For a history of the "preferred freedoms" concept as it has found expression in the Supreme Court's opinions and a discussion of the practical implications of this concept, see McKay, *The Preference for Freedom*, 34 N.Y.U.L. REV. 1182 (1959).

18 See the majority and dissenting opinions in American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Dennis v. United States, 341 U.S. 494 (1951); Barenblatt v. United States, 360 U.S. 109 (1959); Beauharnais v. Illinois, 343 U.S. 250 (1952).

19 Brown v. Board of Education, 347 U.S. 483 (1954).

A series of follow-up per curiam decisions indicate that the Court regards all segregation legislation as invalid.[20] Even though the Court has repeatedly said that classification is a matter for legislative discretion and that the rationality of classification will be presumed, the Court has made clear that classification by race or color is inherently irrational and will not be sanctioned.

What, then, is the emerging pattern with respect to protection of basic rights, particularly as it bears on the Supreme Court's contribution to the rule of law. The pattern I think is quite definite. The heightened emphasis upon procedural regularity in the protection of the accused, upon freedom of expression in its various facets, and upon equal protection regardless of race or color, all indicate concern for the central values of a democratic society, namely, the worth and dignity of the individual and the opportunity for free expression of ideas and beliefs, both because free expression is vital to the development of the individual and because it is indispensable to the political freedom of our society. On the other hand, the determination of basic economic policy is a matter reserved for the people through their elected representatives. What is important here is that the people's right to be heard on these matters and to have a voice in the decisions remains unimpaired.

An enlarged conception of national powers adequate to meet human needs at a time when the positive responsibilities and duties of government are receiving new emphasis, increased scrutiny of executive power in the interest of maintaining its subordination to the law-making power, and broadened protection of procedural rights, the freedoms of expression, and the freedom from discrimination—these are the vital elements conspicuous in the current processes of constitutional adjudication. Together they constitute the picture of the kind of society the Supreme Court envisages under our Constitution and which furnishes the values basic to our Rule of Law. It is a free and open society premised on democratic principles, concerned with the supremacy of the law-making power over the executive, committed to the freedom and the dignity of the individual and his opportunity for development and expression, and at the same time, responsive to basic human needs.

To some it may appear that the growing acceptance of the concept of the welfare state intervening in increasing greater measure

[20] See, *e.g.*, Mayor and City Council of Baltimore City v. Dawson, 350 U.S. 877 (1956) (segregation at public bathing beach); Holmes v. City of Atlanta, 350 U.S. 879 (1956) (segregation at public golf course).

in the lives of its citizens and assuming greater direction for the control of their actions is antithetical to the basic idea of freedom and incompatible with the whole concept of the Rule of Law. It is true that if Rule of Law means nothing more than legal restraints upon the actions of government, our whole current development marks a move in the wrong direction so far as preservation of the Rule of Law is concerned. How far regulation by the government of the lives of its citizens can go without impairing the freedoms and values basic to a democratic society is, indeed, a critical and important question. If by the concept of the welfare state we mean that the state should assume the responsibility to act in a positive way to meet minimum basic human needs, to provide a floor in defining the standards essential to an existence compatible with human dignity and the conditions essential to man's development as a physical, intellectual and moral creature, a program of enlarged governmental activity may serve to protect and enlarge the freedoms we cherish. But the expansion of governmental services and the proliferation of the bureaucracy in regulating the people's affairs and dispensing public benefits make all the more imperative the observance of the freedoms that insure the citizen's liberty of person, his right to be free from arbitrary and unauthorized interference by officers of the executive and administrative departments, his right to equal treatment under the law, and his freedom to express himself and exercise a voice in the determination of the legislative policies that affect his well-being.

2. *The Supreme Court Under the Rule of Law*

As indicated at the beginning of this lecture, it is relevant to inquire not only respecting the Supreme Court's contribution to the Rule of Law but also to consider the question whether and in what ways the Supreme Court as an institution and as one of the arms of government is itself subject to restraints implicit in the Rule of Law concept. For if it is true that this is a government of laws and not of men, it is appropriate to inquire how the Supreme Court in the exercise of its power of review fits into this pattern. Charles Evans Hughes once said that the Constitution is what the judges say it is. This is true. And certainly the whole constitutional development of the past twenty-five years, with its marked changes in constitutional interpretation, indicates that the Court feels free to reconsider and to re-interpret the fundamental law in order to accommodate its changing insights and points of

emphasis with respect to the basic policies and values protected by the Constitution.

If the power of interpretation is unrestricted, we are at the mercy of a judicial oligarchy, a situation no more compatible with democratic notions than rule by a dictator or by a triumvirate. We may all agree with Judge Learned Hand that if we have to choose between rule by "a bevy of Platonic Guardians," no matter how wise and well-intentioned, and rule by elected representatives of the people, we should choose the latter.[21]

What, then, are the restraints on the judiciary to insure its exercise of its important powers in a manner commensurate with the basic premises of a democratic society? In his famous dissent in the *Butler* case[22] Mr. Justice Stone told his colleagues that the only restraint on the Court's power was its own sense of self-restraint. There is much truth in this statement but it is not completely accurate. As Hamilton observed in the *Federalist Papers* the federal judiciary is the weakest branch of the government in that it lacks the resources of physical power and money that give strength to other agencies of government.[23] Congress can determine the size of the Supreme Court, the salaries of the judges, and even limit the Court's jurisdiction. The Court is in this sense dependent on Congress, just as it is dependent on the executive department when ultimate questions arise with respect to enforcement of the Court's decrees. An even more important control, however, is reflected in the Court's responsiveness to the forces of public opinion. Since the Court's formal position in the structure of constitutional power is a relatively weak one, its strength and independence depend ultimately on its moral authority as measured by the public trust, respect and confidence generated by the Court's reputation for disinterestedness, integrity, and a sober sense of responsibility in the discharge of its important and delicate tasks. Like any other institution of government, the Court is subject to the corrective process of public judgment. Moreover, public opinion exerts an invisible influence in determining the policy and value norms, or, if you prefer, the prepossessions and predilections, that enter into the substance of the judgment process. Judges, by virtue of their education, training, and the development of their intellectual and emotional processes and responses, cannot divorce themselves

21 HAND, THE BILL OF RIGHTS 73 (1958).
22 United States v. Butler, 297 U.S. 1, 78 (1936).
23 No. 78. See Beard's edition, THE ENDURING FEDERALIST 332 (1948).

from the movement of ideas and events that shape contemporary political, social, and economic developments. It is true in this sense, as Dooley once observed, that the Supreme Court follows the election returns.

Even though our history demonstrates that over a period of time, judicial sensitivity to public opinion, coupled with changes in Court personnel, will insure a flexibility of interpretation responsive to new conditions and new conceptions of the role of government in our society, it remains true that the insight, sense of responsibility, and disinterestedness that the Court brings to the discharge of its task at any given time are important to the nation. A reckless exercise of power by the Court may have damaging effects. We need to be reminded that the Supreme Court's intervention in the slavery dispute in the *Dred Scott* case,[24] with the mistaken thought that this great issue could be resolved by judicial decision, is now regarded by historians as a tragic event that fanned the flames of sectional controversy and hastened the further events that produced the Civil War. Likewise we may recall that the Court's one-time adamant position in restricting congressional power under the commerce clause, coupled with its concern for freedom of contract and of business enterprise as dominant values under the Constitution, precipitated the constitutional crisis of the 1930's, when the Court was threatened with a deliberate court-packing proposal designed to bring it into line with new conceptions rooted in the realities of American political and economic life. Fortunately, the unfavorable response of Congress and the public, together with the Court's own self-corrective action, resulted in rejection of this bold proposal which, if it had been adopted, would have struck a serious blow at the independence and integrity of the judiciary and established an ominous precedent.

The point has been made that the Court in recent years has adapted constitutional interpretation to conceptions of policies and values it regards as vital to our democratic society. Federal powers have received broadened interpretation, and procedural rights, freedom from discrimination, and the first amendment freedoms have received greater emphasis whereas the judicial protection of economic liberty has been devitalized. In the course of this development older cases have been overruled, and the principles established by them have been discarded. But to mention these

[24] Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

changes is to suggest at once the question whether the very conception of the Constitution intended to endure for generations to come does not require a steadfastness in interpretation which precludes rejection and overruling of prior doctrines and principles which through the decisional process have become a part of the law of the land.

Certainly it is true that stability in constitutional interpretation is important if the notion of a fundamental law is to serve its purpose, and if the Court is to preserve its role as a judicial tribunal which operates within the bounds of an inherited and controlling legal tradition and thereby itself acknowledges the Rule of Law. Fortunately the common-law method followed by the Supreme Court in the process of constitutional adjudication—a method characterized by respect for precedent and the further development of the law in the light of prior decisions — does in itself operate as a powerful restraint upon judicial subjectivity and individualism and thereby contributes to stability and to orderly continuity in the progression of the law. The common law of the Constitution, found in the accumulated crust of judicial interpretation, is a tough law. The force of prior decisions and the inherited tradition is such that the Court cannot lightly disregard precedent. The burden is upon the Court to demonstrate by a clear and convincing case that a change in constitutional interpretation is required, either to correct demonstrable error in earlier adjudications or to adapt interpretation to new circumstances. Even if these conditions are satisfied, the Court must weigh the further question whether the benefits resulting from change outweigh the advantages served by preserving the law's stability and whether the responsibility for change lies with the Court. But within these limits there is and should be room for change and growth in the law. The common law itself is not static. Even if it is a tough law, it is not stiff and immutable. Its vitality is attributable to its capacity for change and growth in response to new circumstances. Indeed, as Professor Cooperrider pointed out in his lecture, a general relaxation of the *stare decisis* doctrine is apparent in the American judicial process.

Mr. Justice Brandeis pointed out some years ago that the formal doctrine of *stare decisis* should not have the same relevancy in the area of constitutional interpretation as it has in other fields of the law.[25] Judicial doctrines in the development of the common law

[25] See his dissenting opinion in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-411 (1932).

or in the interpretation of statutes can be modified by legislative act if they appear to be erroneous or otherwise unsound. But correction of past interpretations of the Constitution, if now found to be clearly erroneous, or no longer applicable to changed conditions, can be corrected only by the Court itself or by resort to the laborious process of constitutional amendment. Flexibility of interpretation has itself been an important factor in preserving the vitality of our 173-year-old Constitution so that it has continued to serve many generations.

In the reconsideration of prior decisions and previously established principles, a distinction should be observed between the situation where the Court alone can correct what it may now regard as erroneous or no longer applicable decisions and the situation where Congress is competent to take care of the matter. We may take as an illustration the case decided two years ago where the majority of the Court reaffirmed the power of the federal courts to punish summarily for contempt.[26] This power has been exercised since the very early days, subject only to limitations imposed by Congress in certain types of cases. Yet the dissenting Justices were ready to declare this time-honored practice unconstitutional. Here it seems is clearly a case where Congress is competent to correct an abuse of power, and where any fundamental change should be accomplished by legislation and not by judicial decision.

Apart from the limitations inherent in the operations of a tribunal that derives its inspiration from the judicial process of the common law, the Supreme Court has formulated for its own guidance a series of self-imposed limitations designed to assure self-restraint and a sense of responsibility in the exercise of its important powers. It will not deal prematurely with constitutional questions, it will interpret statutes if possible to avoid constitutional issues, it will insist that only parties with proper interests at stake in the litigation be allowed to raise constitutional questions, it will presume the validity of legislation, and it will accord a high measure of respect to the legislative determination. The validity and significance of some of these self-imposed limitations have come to the fore in contemporary developments within the Supreme Court. In the light of the basic philosophy of self-restraint underlying these limitations, it becomes pertinent to inquire how vigorously, if not even aggressively, members of the Court should emphasize the values they deem essential to our constitutional order. Ad-

[26] Green v. United States, 356 U.S. 165 (1958).

mittedly much of the language of the Constitution admits of wide and varying constructions. The words drawn from the four corners of the document furnish no automatic answer. Complete objectivity in the construction of the written document is not possible. The prepossessions and predilections of the judges and their policy preferences do shape the decisional process. The vigor and enthusiasm with which a judge emphasizes and elevates a given constitutional value embodied in the Constitution will depend entirely on him.

The problem is illustrated by the continuing controversy within the Supreme Court on the interpretation of the first amendment's freedoms. Conceding their importance, should they be construed in an absolute way or should account be taken of appropriate public interests that may be protected by Congress even at the expense of limiting these rights to some extent. The group of so-called "activists" on the bench, headed by Justices Black and Douglas,[27] give these rights an absolute construction, and hence deny the Court's authority to consider and weigh counter-balancing public interests that may be asserted to justify restrictions on these rights. A majority of the bench hold that the first amendment rights are not absolute, that they may be limited by Congress if if there is a rational ground in terms of public interest to justify the restriction, and that the Court's function is to balance the interests protected by the free speech guarantee against the competing public interest. Indeed, Mr. Justice Frankfurter has no use for the idea that the usual presumption of validity of legislation is to be discarded when first amendment freedoms are involved.[28] Similarly, in the construction of procedural rights, there is the division within the Court between those who would give these rights the widest possible construction and the others who would temper them with greater regard for the considerations of public safety in the effective enforcement of the criminal laws as well as for the principle of federalism where state prosecutions are involved. The question is not whether the Court should be hard or soft on Communists or on criminals or whether the Court is sympathetic with or hostile to the policies underlying the challenged legislation.

[27] See Justice Black's dissenting opinion in American Communications Ass'n v. Douds, 339 U.S. 382 (1950); dissenting opinions of Justices Black and Douglas in Dennis v. United States, 341 U.S. 494 (1951); Justice Black's dissenting opinion in Barenblatt v. United States, 360 U.S. 109 (1959). See also Justice Black's address, *The Bill of Rights*, published in 35 N.Y.U. L. REV. 865 (1960).

[28] See his separate opinion in Kovacs v. Cooper, 336 U.S. 77 (1949).

The question is one of the Court's proper role in the exercise of the power of judicial review. It appears to me, in light of our constitutional history, that the Court best discharges its position, always a delicate one, when it adheres to the limitations it has over the years imposed on itself and attempts the kind of judicial disinterestedness that is evident in the process that identifies, appraises and weighs all the interests at stake in the cases that come before it. But preference for a pragmatic balance-of-interest approach, as opposed to absolutism, in the interpretation and enforcement of constitutional rights can be supported only if the competing interests are adequately identified and weighed by the Court. This process makes a heavy demand upon judgment. Without such careful inquiry, the principle of respect for the legislative determination and the balancing-of-interest technique furnish ready avenues for the facile rationalization of governmental power at the expense of constitutionally-protected rights.

Respect for the Rule of Law as a restraint upon its own powers requires of the Court that its decisions be rendered on the basis of adequate and full consideration. At first blush it may appear that emphasis upon this point is wholly gratuitous. Certainly the Court's operations as a whole furnish no basis for any general criticism that it decides cases without the benefit of adequate deliberation. Indeed, the Court's history has demonstrated an overall high level of performance. For this very reason some aspects of the Court's recent work invite special consideration.

Attention may be called to some instances of hasty or ill-considered decisions. Perhaps the most dramatic illustration is the Court's extraordinary behavior in the cases dealing with military trials of civilians abroad. When the *Covert* and *Krueger* cases were first decided, the Court, speaking through Mr. Justice Clark, held that the legislation authorizing these trials was constitutional.[29] Three Justices dissented, and Mr. Justice Frankfurter significantly deferred opinion because he had not had time to consider the case thoroughly. At the following term, these cases were restored to the docket, and this time a majority held that military trial in this kind of case was unconstitutional.[30] Mr. Justice Clark, joined by Mr. Justice Burton, dissented. To climax this story, the Court in a series of cases decided this term[31] further extended the principle of the earlier holding, and Mr. Justice Clark

29 351 U.S. 470 (1956).
30 354 U.S. 1 (1957).
31 See the later cases cited in note 10 *supra*.

wrote the opinion. Let it be said to Mr. Justice Clark's credit, however, that after his original views had been rejected by the majority, he did not persist in dissent in the face of the established law to the contrary.

It seems clear that the Court did not take enough time for deliberation and decision when it handed down its first decision in the military trial cases. But the more disturbing kind of case indicating lack of thorough consideration arises when the Court within a short time after dealing with a problem feels obliged after further deliberation and consideration to overrule or sharply limit what was said in its first opinion. The released-time cases furnish a good illustration. In the *McCollum* case[32] the Court held, with only one Justice dissenting, that a school board's program of released time for religious instruction was invalid. Yet only four years later in the *Zorach* case,[33] a majority of the Court upheld a released-time program and distinguished *McCollum* on a ground which Mr. Justice Jackson in dissent called trivial and cynical. More importantly, the majority opinion in *Zorach* proceeded on premises radically different from those on which *McCollum* was based and more in accord with Mr. Justice Reed's dissent in the latter case. It is apparent that some of the Justices who concurred *sub silentio* in Mr. Justice Black's opinion for the majority in *McCollum* did not give thorough consideration either to the implications of the majority opinion or to the considerations expressed in the dissenting opinion.

Finally, a word should be said of the Court's responsibility for formulating meaningful and coherent principles of constitutional interpretation. There is a school of thought which belittles the significance of general principles and concepts and regards them only as symbols or tools of the trade to support a decision resting on the judge's reaction to the case and the facts before him. The role of the Supreme Court, however, in guiding the federal and state courts and in educating the American public on the meaning of the Constitution requires that the Court ground its decisions on reasoned argument and formulate rational and coherent principles that serve to illuminate and give guidance as well as to keep the Court itself within the bounds of law. The Court's contemporary work too often fails to illuminate and on the contrary leads to confusion and obfuscation. I may take as a prime example the

[32] McCollum v. Board of Education, 333 U.S. 203 (1948).
[33] Zorach v. Clauson, 343 U.S. 306 (1952).

cases dealing with the question whether a public employee may be dismissed because of invoking the fifth amendment before an investigating committee. The *Slochower* case said no.[34] But later decisions culminating in the *Globe* case[35] decided this spring say yes. The distinction made by the Court between the two cases seems wholly formal and verbal and hardly suggests a substantial underlying principle.

A curious evasion of principle was manifest in one of the recent decisions upholding a state power to tax property owned by the United States and used by private persons. In order to sustain this taxation in the *Murray Corporation* case[36] the Court in its majority opinion held that even though under Michigan law the tax was a property tax which according to familiar principles could not be imposed on property to which the United States held title, still the Court, in the face of the local characterization, would treat it as a use tax in order to sustain its validity. The old principle is observed but devitalized by this kind of reasoning.

Mention may also be made at this point of the uncertainty and confusion engendered by the Court's decisions on the relationship between the first amendment and the due process clause of the fourteenth amendment. According to the classic line of interpretation the freedoms recognized in the first amendment are regarded as fundamental freedoms protected by the fourteenth amendment. But does this mean that the first amendment is literally incorporated in the fourteenth amendment? The distinction is important since it goes to the question whether these freedoms have the significance accorded first amendment freedoms or whether as far as state action is concerned they are subject to reasonable restraints in the exercise of the police power according to familiar due process conceptions. Yet the Court's opinions show uncertainty and lack of consistency on this important question.[37]

34 Slochower v. Board of Higher Education of New York City, 350 U.S. 551 (1956).

35 Globe v. County of Los Angeles, 362 U.S. 1 (1960).

36 City of Detroit v. Murray Corp. of America, 355 U.S. 489 (1958).

37 Mr. Justice Douglas in his opinion in Speiser v. Randall, 357 U.S. 513, 530 (1958), cites a number of cases to support his proposition that the first amendment "is applicable in all its particulars to the States." *Cf.* the view expressed in Mr. Justice Jackson's dissenting opinion in Beauharnais v. Illinois, 343 U.S. 250 (1952), and in Mr. Justice Harlan's dissenting opinion in Roth v. United States, 354 U.S. 476 (1957), and in his separate opinion in Smith v. California, 361 U.S. 147 (1960), that a distinction should be observed between freedom of the press protected under the first amendment and freedom of the press as a fundamental right protected under the due process clause of the fourteenth amendment. At the least it must be said that the question admits of more doubt and uncertainty than Mr. Justice Brennan recognizes in his opinion in Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960).

At times, depending on who writes the opinion, the Court speaks as if the first amendment is directly applicable to the states. At other times it speaks only of due process considerations.[38] The question will continue to be a source of confusion unless and until the Court commits itself to some coherent theory of interpretation.

I call your attention also to the recent tendency to use with increasing frequency the summary per curiam opinion as a substitute for reasoned opinion. In some instances it is employed as a means of implied restatement of the rationale underlying a prior decision. It will be remembered that the famous school desegregation decision[39] rested squarely and peculiarly on the finding that segregation in public schools resulted in harmful, discriminatory effects on Negro children. Yet in view of a series of later per curiam decisions,[40] it must now be inferred that the school desegregation decision really was grounded on a broader principle, namely, that all segregation legislation is invalid since it rests on an impermissible basis of classification.

But the per curiam opinion is also used as a means of deciding cases without the necessity of formulating an underlying principle, as illustrated by the movie censorship cases. In its opinion in the *Burstyn* case[41] where the Court first held a movie censorship board's determination invalid, stress was placed on the idea that the term "sacrilegious" was too broad to serve as a standard under a system of control that operated as a previous restraint on freedom of expression. Then, however, by a series of per curiam decisions[42] which dealt with different statutory standards, the Court, citing *Burstyn,* extended the holding in this case in such a way as to leave any controlling principle clothed in obscurity. Did the later per curiam decisions mean that all movie censorship was invalid, or that the varying standards used were all equally objectionable as being too broad, or did they mean that the Court thought that it was an arbitrary and unreasonable exercise of administrative power to bar the showing of these particular

38 *Compare,* for instance, Everson v. Board of Education, 330 U.S. 1 (1947), *with* Beauharnais v. Illinois, 343 U.S. 250 (1952). And for cases decided during the current term, *compare* Talley v. California, 362 U.S. (1960), *with* Bates v. City of Little Rock, 361 U.S. 516 (1960).

39 Brown v. Board of Education, 347 U.S. 483 (1954).

40 See the cases cited in note 20 *supra.*

41 Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

42 Gelling v. Texas, 343 U.S. 960 (1952); Superior Films, Inc. v. Department of Education of State, Commercial Pictures Corp. v. Regents of University of State of New York, 346 U.S. 587 (1954); Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955); Times Film Corp. v. City of Chicago, 355 U.S. 35 (1957).

films, and, in the latter event, was the Court undertaking to review each film on its merits? The several opinions in the later *Kingsley International Pictures Corporation* case[43] did finally contribute to shed some light on these questions, although the division of thinking within the Court still leaves much in doubt. Admittedly the summary decision process serves an advantageous purpose for the Court when its members cannot agree on the reasons for the decision, but it is not a satisfactory method for developing and extending new principles of constitutional interpretation.[44]

The problem of distilling meaningful principles of interpretation from the Court's opinions becomes complicated and is made more difficult by the multiplicity of opinions and the fragmentation of the Court on important issues.[45] There can be no quarrel with dissenting opinions and the freedom of the judges to write them. Dissenting opinions have played their part in the further development of the law. Similarly, the practice of writing separate concurring opinions is not in itself objectionable. But the question may well be raised whether the practice of writing separate opinions has not in recent years reached undue proportions and impaired the effectiveness of the Court's work and weakened its position in the eyes of the public. It is not simply that the fragmentation of views finding expression in a spate of separate opinions often makes difficult, if not impossible, the task of distilling any meaningful controlling principle from the case, even though this is in itself an important consideration that should not be minimized. The more important question is whether the Court is discharging its responsibilities as a corporate tribunal that reaches judgment on the basis of a collective consideration that transcends individual views and preferences. In some instances multiple opinions reveal differences of approach and interpretation that might well have been ironed out, or at least clarified, had the judges more fully examined and analyzed the problems in the course of their own internal discussions. Perhaps the explanation here is that the Court is overworked and does not have sufficient time for its own internal deliberations.[46] In justice to the Court,

[43] Kingsley International Pictures Corp. v. Regents of the University of the State of New York, 360 U.S. 684 (1959).

[44] See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20-23 (1959).

[45] See ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186 (1959).

[46] The point is developed at length by Professor Hart in his article, *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

however, it must be recognized that its work by its very nature places extraordinary demands upon the time, energy and reflective processes of the judges in dealing with important and complex problems that encompass a wide range of subject matter. The Court does have a big job to do, and any counsel of perfectionism with respect to the way it should discharge its task is gratuitous. But it may well be that the Court is undertaking to review and decide too many cases at the expense of the time required for both collective and individual deliberation. The Court is master of its own house in respect to the number and kinds of cases it will hear.

The problem, however, of division within the Court goes beyond the question of adequacy of corporate deliberation. The ultimate question is how far a judge is willing to subordinate his own views in the interests of a common collective judgment. This, too, is a problem of self-restraint, and in the end its resolution must rest on the conscience of the judge. Surely consideration must be given to the weakening consequences of divisiveness and, conversely, to the strength found in unity. The Court's unanimous decision in the school desegregation case will remain a classic example of the impressive weight and authority that attach to the Court's judgments when it speaks with a single voice.[47]

In bringing this lecture to a close I should not conclude on a negative vote. Like any human institution the Supreme Court is subject to criticism, and in view of the important powers exercised by the Court — powers that vitally pertain to matters of great national concern — it is not only proper but wholesome and desirable that the Court's work be subject to public discussion and criticism. But criticism and expressions of dissatisfaction, whatever the occasion and whatever the ends to which they are directed, should not obscure our awareness or appreciation of the extraordinary contribution that the Supreme Court has made in vindicating the supremacy of the fundamental law as a limitation on governmental authority, in maintaining the vitality of the great symbols of our constitutional tradition, in protecting the rights of the individual, and in promoting freedom, equality, and justice under the law. We gratefully acknowledge this and also the integrity, high-mindedness and sense of dedication which the members of the Court have brought to their tasks and which have contributed so im-

[47] It is worth noting in this connection that in Cooper v. Aaron, 358 U.S. 1 (1958), the Court, in order to give the maximum weight to its decision, resorted to the extraordinary device of rendering an opinion of the Court signed by all nine Justices.

portantly to the reputation that the Court has established for itself as one of the world's great tribunals. In the adherence to the high standards and traditions maintained over the years of its long life lie the hope and promise of the Court's continued fulfillment of its pre-eminent role in vindicating the Rule of Law.